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NATURAL LAW IN AQUINAS AND SUAREZ

Do we have a clear understanding of natural law today? Or, among legal scholars and ethicists who are not natural lawyers, do they have a proper grasp of what they are opposing? The idea of natural law had given rise to numerous disputed questions and divergent usages long before the time of Aquinas, and Aquinas's own careful distillation and synthesis of these ideas was again put into dispute immediately after his death in 1274.¹

For the natural lawyer, there are two principal modes through which natural law is known by us: first through a reflective understanding of our own inclinations and needs, and secondly through the scholarly texts by which a correct image of natural law has been transmitted to us. The subject of this essay is how a proper grasp of natural law can be gained from an examination of these various transmitters of natural law doctrine.

I shall argue that the dominant image of natural law that has been received by legal philosophers is an incorrect image. This is the (for want of a better term) Leonine Thomism of John Finnis and his followers, as opposed to the Suarezian Thomism that is, in my view, closer to Aquinas's true intentions, but has been steadily suppressed since the later nineteenth century. The story of the suppression of Suarez is too large a matter for the present essay, and was almost certainly in motion before Pope Leo XIII's momentous encyclical *Aeterni Patris* of 1879. There, those who were in charge of the teaching of moral theology in the seminaries were urged to return to the 'wholesome fruits' of the teachings of Aquinas, and to avoid the efforts of the 'struggling innovators of the sixteenth century' in which one encounters 'differing and clashing' conclusions proceeding from 'tottering and feeble' philosophies.² Roman Catholic intellectuals have been overwhelmingly faithful to that message. Popular Thomistic commentaries and works on natural law in the earlier part of the twentieth century espoused a form of Thomism explicitly hostile to the standpoints of late scholastics, such as Suarez, whilst other works on political ethics directly attacked the errors and confusions of those 'ill-advised innovators.'³ In the aftermath of the Second Vatican Council, significant works of natural law continued in this effort to denigrate the work of Suarez and to recover a Thomism purged of 'Suarezianism.'⁴

The controversy between the two positions consists in an argument about the legal character of natural law. For the modern Leonine Thomists insist that natural law is a synonym for 'ethics'; that it is not a 'law' except by analogy, and that the analogy is misleading and unfortunate.⁵ They accuse Suarez of having departed from Aquinas in holding that natural law is a species of willed command by a divine legislator, in opposition to the eudaimonist ethics of Aquinas which is centered upon the intellect's grasp of the good.

Any effort to recover a proper understanding of natural law therefore faces two obstacles. In the first place, it must overcome an incorrect understanding of Thomas Aquinas's doctrine. In the second

¹ Among some of the most notable early critics of Aquinas were Etienne Tempier, Bishop of Paris, several of whose Condemnations of 1277 (of philosophical propositions contrary to Christian truth) were directly aimed at Aquinas; Henry of Ghent (e.g. *Quodlibeta*, I & IX); William de la Mare, whose *Correctorium Fratris Thomae* was prescribed reading for anyone wishing to read the *Summa*, by order of the Franciscan order; Johannes Duns Scotus (e.g. *Sent* III.33) and Ockham (e.g. *Sent* III.11; *Quaestiones Varias*, 6-7).

² Encyclical of Pope Leo XIII, 4 August 1879 § 24.

³ See in particular W Farrell, *The Natural Law According to St Thomas and Suarez* (St Dominic's Press 1930); Farrell, *Companion to the Summa* (4 vols, Sheed & Ward 1938-42); T Davitt, *The Nature of Law* (B Herder 1951); W Daniel, *The Purely Penal Law Theory in the Spanish Theologians from Vitoria to Suarez* (Gregorian University Press 1968). For some background to the internal tensions of the period after *Aeterni Patris* see GA McCool, *From Unity to Pluralism: The Internal Evolution of Thomism* (Fordham University Press 1989); R Hittinger, 'Two Thomases, Two Modernities' *First Things* (June/July 2008).

⁴ See in particular G Grisez, 'The First Principle of Practical Reason: A Commentary...' (1965) 10 *Natural Law Forum* 168, 184-85n; Grisez, *Contraception and the Natural Law* (Impact Books 1964) 47-70; Finnis, *NLNR* II.6 & XI.6-8; it comes as no surprise to find the early twentieth century works (n 3) being cited with approval in virtually all of these passages.

⁵ See esp Finnis, *NLNR* 23, 251, 280, 374. More recently see J Waldron, 'What is Natural Law Like?' In J Keown & RP George eds. *Reason, Morality and Law: The Philosophy of John Finnis* (OUP 2013) 73; also Finnis's reply, 475-79.

place, it has to demonstrate that Suarez's doctrines are entirely compatible with Aquinas's position. As a first step, therefore, I will aim to clarify the differences that are said to obtain between Aquinas's and Suarez's positions (Part I). Next, I will discuss Aquinas's position on the legal character of natural law in comparison to Suarez (Part II), followed with a discussion of their views on the relation between law and ethics (Part III) and on our rational nature (Part IV), and finally their approach to moral goodness (Part V). Lastly, I will explain Suarez's motivation for adopting a strict view of natural law in the limited instance that he does differ from Aquinas (Part VI), before concluding by asking what lessons can be learnt (Part VII).

I. The Supposed Contrast Between Aquinas and Suarez

Amongst the mistaken images of natural law discussed in the second chapter of Finnis's *NLNR* is the following position attributed to Suarez and other scholastic moralists: that what is right and wrong depends upon what is in-keeping or not in-keeping with human nature. Yet it is only *obligatory* to do what is right and avoid what is wrong because of a divine command expressing the will of God.⁶ This is said to differ from Aquinas's position by replacing the key terms of his analysis, the ideas of 'end' and 'good', with alternative notions of 'right', 'wrong' and 'obligation'. That is to say, natural law considered as the pull of attraction of persons toward properly good things is (on this view) reduced to an idea of natural law as the push of obligation by a superior will, acting on an inferior will. If this image is correct, Suarez does not share Aquinas's aim of advancing a eudaimonist ethics as the true ethics.

As I intend to show, this impression created by Finnis is a false impression. In the most generous case, Finnis's treatment represents a selective and misleading image of the natural law doctrines of Aquinas and Suarez.

The reconstruction of Aquinas's ethics depended on premises that seem in themselves reasonable. In order to grasp even the most basic moral precepts, such as that one must not harm one's neighbour, it is first of all necessary to understand what is *good* for one's neighbour. Both these goods and the practical principles that identify them cannot therefore be themselves moral in character, but are rather the necessary prelude to morality.⁷ Aquinas calls them *quasi fines preceptorum* [more akin to the ends of precepts]⁸ and *seminalia virtutum* [roots of the virtues].⁹ The initial work of practical reason is thus with the identification of *basic* human goods, those genuine and self-evident forms of human flourishing of which Aquinas gives only a few examples (preservation of one's existence, procreative union, knowledge, sociability) and of which perhaps some exhaustive account may be given.¹⁰ Having once enumerated the human goods that it is valuable to pursue, the central and foundational moral questions become: (i) given the infinite variety of ways in which it is possible to devote oneself and one's life to combinations of these goods, and the very finite time, capacities and opportunities at one's disposal, which goods or which combination of goods ought I to devote myself; and (ii) in what ways must I act so as to ensure that I do not *directly* harm, diminish or otherwise qualify such goods, or prevent or restrict others' participation in them?

Two main areas of disagreement are alleged to separate Aquinas's ethics from that of Suarez. In the first place, Aquinas does not attempt to draw truths of natural law from facts of conformity or contrariety to human nature. He considers that moral truth about good and evil is discovered by asking what is reasonable or unreasonable. This inquiry begins from underived [*per se nota*] precepts of practical reason 'which make no reference at all to human *nature* but only to human *good*.'¹¹ The first

⁶ *NLNR* 44-45.

⁷ *Ibid.*, III.1-3; *Fundamentals of Ethics* (Georgetown University Press 1983), III.4.

⁸ Aquinas, *Summa Theologiae* [hereafter ST] I-II.100.11c.

⁹ *Ibid.*, I-II.63.1c.

¹⁰ See *NLNR* III-IV for Finnis's list of seven basic goods. Whether it is or is not possible to provide a complete list of forms of human good is not something I propose to deal with here.

¹¹ *Ibid.*, 36

such precept is the one stated by Aquinas in Quaestio 94.2 of the *Summa Theologiae*'s Prima-secundae pars: that the good is to be done and pursued, and the bad is to be avoided. All other practical precepts are based on this, for every person who acts does so in order to attain some end that they consider to be (at least in some sense) good. For example, preservation of one's life is a good, so that evading threats to one's life belongs to natural law as a precept. Although the order of the precepts corresponds to the order of human inclinations, it is through reason and experience that we gain an impression of these inclinations and the objects that fulfill them. In Suarez by contrast, it is said that natural law is discerned by an attempt to state what is necessary for rational nature, and the primary precept of natural law becomes the injunction to follow one's nature.¹² Hence for Suarez the central act of reason is the person's grasp of directive precepts through the identification of what is unfitting to human nature (and thus morally wrong), as opposed to what is in conformity with rational nature (and so morally permissible or even worthy), or what such a nature demands for its fulfilment (and hence is morally obligatory).¹³ This (so it is said) presents the primary precepts of natural law as precepts of speculative (or theoretical) reasoning, when in fact Aquinas (rightly) characterises them as irreducibly practical.

In the second place, it is said that for Aquinas the central act of reason is a person's intellection of basic forms of human good as ends to be pursued. Accordingly, his treatment of moral issues is 'saturated with the interrelated notions' of *end* and *good*, but it scarcely features the notions of obligation, superior or inferior;¹⁴ for Suarez however, it is said that the notions of good and end are 'almost entirely gone', to be replaced by *right*, *wrong* and cognate notions.¹⁵ All but abandoning the idea of 'end', Suarez is said to displace Aquinas's emphasis on human inclinations as the *source* of our understanding of good and bad, relegating them to the *matter* with which natural law is concerned, and taking the source of good and bad to be the 'intrinsic character' and quality of actions, and the legal quality of natural law as an act of Divine will.¹⁶

On the basis of this characterisation, Finnis wishes to make several points: (i) that the reference to 'good' in Aquinas's primary precept is only incipiently moral, because (ii) it refers to non-moral human goods like knowledge, sociability and the experience of beauty; (iii) there are no moral imperatives for a person to pursue particular goods to the exclusion of others (e.g. by devoting one's life entirely to the contemplation of God); (iv) morality pertains to the reasonableness with which a person pursues human goods, for example by avoiding obtaining them by unjustly excluding others, or by dissipating them. In this way, Finnis defends natural law from the claim that it derives moral precepts from facts, and he reassures liberals that natural law is not a paternalistic moral code. Aquinas's ethics is a eudaimonist ethics: pursuing these goods can lead us to God as our ultimate end, but it also leads to all kinds of earthly happiness even if a person refuses God as their ultimate end.

This defence of natural law involves showing that opponents have only attacked a faulty image of natural law, not natural law itself. Among the sources that give rise to this faulty image, according to Finnis, is Suarez's treatise of 1612, *De Legibus*.¹⁷ For, does not the attempt to derive natural law from 'human nature' violate the principle that value cannot be derived from fact? Furthermore, does not Suarez's insistence upon Divine will as the creator of moral duty leave unexplained the ability of others (e.g. pagans like Aristotle and Plato) to discern genuine moral truth even without revelation or Gospel teachings? Suarez *seems* to suggest that it is only obligatory to do the things that we understand that we ought to do, due to the presence of God's superior will in the practical reasoning of the agent as a push or impulse [*motio*] to perform the right action. Inherent rightness or wrongfulness alone is insufficient to create an obligation: therefore God's will is required to create a law.

¹² See *NLNR* 34-36; 45-47.

¹³ See esp. Finnis *NLNR* 45, citing Suarez, *De Legibus* [hereafter *DL*] II.5.4-5; II.6.17; II.7.4-7.

¹⁴ *Ibid.*, 46.

¹⁵ *Ibid.*

¹⁶ Grisez (n 4) 184-85n, citing Suarez *DL* II.5.1-2, II.6, II.7.2, II.7.5, II.8.2, II.8.4; II.15.2. Grisez offers only a very cursory comparison of what he takes to be the variant approaches of Aquinas and Suarez (instead directing the reader to Farrell).

¹⁷ *NLNR* 42-43.

Discussion of these matters entails analysis of a number of distinct questions: first, whether natural law is properly a kind of law; second, whether natural law is derived from an examination of the rational nature of human beings; third, the nature of obligation, and finally the relationship between goodness and rightness.

II. Legal Character of Natural Law

At the outset of Aquinas's systematic treatment of law in the *Prima-secundae*, he asks (1) whether law has some relationship to reason; (2) what is the object or end of law; (3) whether any person of sufficient rationality is competent to create laws; and (4) whether laws must be promulgated in order to have binding effect on those subject to it.¹⁸ He replies that law, in the most fundamental sense of the term, is a rule or measure of acts; that its proper object is the common good; that it requires a legislator or lawgiver competent to impose commands and move others to action through obligation; and that all of these features require publication. It will be convenient to begin by focusing on this last issue. Here Aquinas gives his response to the question whether promulgation is necessary, since natural law possesses above all the character of law but does not seem to have been promulgated:

I respond that, as already stated (I-II.90.1) a law is imposed upon others in the form of a rule or measure. Now a rule or measure is imposed by being applied to those who are to be ruled or measured by it. Accordingly, for a law to gain the quality of obligatory force that is proper to a law, it is necessary that it be applied to persons who ought to be regulated according to it. And this application is achieved by its being brought to the awareness of those persons by promulgation. Consequently, promulgation is necessary in order for a law to obtain its obliging power...

His reply to the initial objection is that the natural law *is* promulgated; but the manner of its promulgation differs from that of the superior expressing an order to a subject. Instead, its promulgation 'is the very fact that God has placed it into human minds so that it can be naturally apprehended'.¹⁹ So, promulgation in the case of natural law is not a type of act – a command²⁰ – but a 'very fact': the fact that its obligatory content (and force) are naturally available to human comprehension.

It may seem as if Suarez's account is opposed to this, given his emphasis upon natural law as a command of divine will.²¹ But in fact the importance of divine command for Suarez does not relate to promulgation, but to the natural law's obligatory force: he says very clearly that an obligation cannot take effect in the inferior will except insofar as it has been promulgated sufficiently, and that the basis of obligation is not the promulgation but rather the generating cause of obligation (i.e. the divine will).²² To see whether this accords with Aquinas's understanding of natural law's obligatory character, we need to consider his account of obligation.

In the passage quoted above, Aquinas is using the language of 'obligation' [*obligare*] to describe the character of natural law, not simply that of moral duty [*debitum*] according to which one ought [*debere*] to do or refrain from something. Aquinas distinguishes what is legally due – which arises from the constraint imposed by law – from what is morally owed out of the rightness [*honestas*] and necessity of virtue,²³ a necessity owing not to the imposition of a rule but to the 'intrinsic appropriateness of the thing itself'.²⁴ In a similar spirit, Aquinas's late-Scholastic commentators often marked the difference between *debitum* (what is owed or ought to be given) and *obligatio* (legal obligation in the proper sense), by observing that moral obligations are laws only in a qualified and extended sense, being indicative of

¹⁸ *ST* I-II.90.1-4.

¹⁹ *Ibid.*, I-II.90.4 ad 1.

²⁰ I mean 'command' here in the performative sense: law could be a fact but also a command in the sense of embodying an imperative to action. (See further below.)

²¹ See e.g. *DL* I.5.24; I.12.4.

²² *Ibid.*, I.12.4.

²³ *ST* II-II.80.1c.

²⁴ *Ibid.*, I-II.60.3c [*convenientia rei*].

what must be done, whereas law in the proper sense is an imposed rule or prescription. The intention was to demonstrate that natural law ought to be regarded as a *lex praeceptiva* rather than a *lex indicans*, a view which gains some purchase in numerous passages in Aquinas.²⁵

It is not Aquinas's intention to depict natural law as a kind of externally imposed standard promulgated by a divine law-creating will. Yet even a *lex indicativa* is still a type of *lex*, so an account is needed of the qualities that make an indicative rule a law. As already noted, the natural law's publication to human minds is not a matter the insertion of a divine command into the mind, as to a passive and receptive vessel. But it nevertheless belongs to law to command, and not simply proffer advice [*consilium*].²⁶ Aquinas reconciles these claims by noting that commanding is a function of reason, not of will.²⁷ So the imperative aspect of law does not need to be understood as the action of one will setting another in motion, much as one billiard ball imparts its energy to another upon striking it. Indeed it cannot be so understood: even in the case of declared laws, the subordinate must promulgate to themselves as an *active* principle the law received by the lawgiver, so as to participate in its directivity.²⁸ (Modern jurists possess the idea of an 'internal aspect' of rules, the subject's 'reflective critical attitude' or 'acceptance' of the rule as a standard of compliance and criticism.)²⁹

In elaborating upon these ideas, Aquinas is repeatedly drawn to comment on the famous passage in Romans 2:14 ('When Gentiles, who have not the law, do by nature the things required by the law, they are a law for themselves...') His gloss on the passage states that a person is 'a law to themselves' to the extent that they '*perform* the duty of the law which pertains to them, by *instructing themselves* and *leading themselves* toward the good [i.e. the good required by the duty]'.³⁰ Thus the good person 'is not compelled by an external law', whereas the unjust 'have to be compelled externally.' This statement needs to be carefully understood: Aquinas is not saying that the just are not *subject* to a law external to themselves, or originating outside themselves; merely that they are not *compelled* by reason of an external principle.³¹ The italicised words in the quoted passage indicate that the natural law 'is the *participation* of eternal law in rational creatures', a mode of participation that is properly called a 'law' since a law 'is something pertaining to reason'.³²

This position is further reinforced by reference to the third of the issues mentioned above (whether anyone sufficiently reasonable can create laws). Aquinas says that only one properly authorised may create law: other precepts, given expression by others, are not law and do not have coercive power. Natural law is distinct from mere moral advice, even therefore advice to oneself through the formulation in one's own mind of ethical norms. In recognizing a natural law, one does not 'bind oneself' in the strictest sense,³³ but recognizes that one is bound by the law-like order of the universe shaped by God (eternal law). Thus part of the mind's apprehension of natural *law* pertains to the perception of its coercive power, which moral exhortations on their own lack.³⁴ Legal precepts stand to the practical intellect as *conclusiones*,³⁵ a rule or measure of action 'by which a person is *induced* to

²⁵ For example, *ST* I-II.92.2 ad 1 ('every law is a kind of precept'); also 96.1 ad 2; & 92.2 ad 2 ('Provision of advice is not a proper function of the law, though this lies within the competence even of a private person, who cannot make a law ... and is not considered as an effect of law.');

²⁶ *ST* I-II.90.3 ad 2; I-II.96.5c; I-II.90.2; I-II.92.2 ad 2. (See also Waldron, n 5, 76.)

²⁷ But presupposing an act of will: *ibid*, I-II.17.1c; I-II.90.1sc; II-II.81.5 ad 1; *De Veritate* 22.12 ad 4.

²⁸ *Ibid*, I-II.90.3 ad 1; I-II.90.1 ad 1.

²⁹ Hart *The Concept of Law* (3rd edn, Clarendon Press 2013), 57.

³⁰ Aquinas, *In Rom* II.3 (my emphasis); see also *ST* I-II.109.4 arg 1; *Summa Contra Gentiles* [hereafter *SCG*] III.128.9; *De Virtutibus* 8 arg 3; *De Ver* 1.2 arg 5 & 17.1 sc 2.

³¹ See in particular the clarification against those who 'reason badly' to this conclusion, *SCG* III.128.9.

³² *ST* I-II.91.2 ad 3.

³³ See e.g. *ST* I-II.96.5 ad 3; I-II.97.3c; I-II.98.3 ad 3.

³⁴ *ST* I-II.90.3 ad 2: if another's (or by extension one's own) moral advice to oneself is not taken, 'it has no coercive power.'

³⁵ *Ibid*, I-II.90.1 ad 2: more precisely, as quasi-conclusions: 'hence we find in practical reason something that occupies the same position in relation to operations, as the proposition in the speculative intellect holds in relation to conclusions. Such universal propositions which in the practical intellect are directed to actions, have the nature of law.'

some action or *restrained* from it; because the word ‘law’ [*lex*] is derived from ‘*ligare*’ [to bind], for it binds a person to act.’³⁶

It can now be made clearer why Aquinas uses the language of ‘obligation’ in respect of natural law. He follows tradition in affirming that ethical precepts of natural law obtain their rightness [*honestas*] not from having been willed or commanded by God, but from the intrinsic goodness or badness of the things enjoined or prohibited.³⁷ (God could not make killing the innocent morally right, for it gets its wrongness from the inherent contrary-to-human-good-ness of the act which deprives the person of life, for life is a human good.)³⁸ This is what makes it possible for the Scholastics to say that, even in the extremely counterfactual situation that God does not exist, the ethical norms of natural law would retain their truth.³⁹ But to this truth is added the cognition that its creation is not the fruit of our own efforts of reasoning, that its binding force is not created or held in place by such mental acts. So, in relation to a given act φ , there are facts which make it true that one ought [*debet*] to do φ ; and then there is the grasp of the obligatory character of doing φ : natural law is the product of both of these elements.⁴⁰

Suarez’s account of these matters corresponds very nearly to that of Aquinas. Certainly Suarez believes that law *as it exists in the mind of the legislator* is a just and morally upright act of will addressed to an inferior; but he maintains that the cause whereby we come to know the law is not the same as the cause that brings its obligation about.⁴¹ Like Aquinas, he regards the essential rightness or wrongfulness of an action as the source of moral duty, not the divine will, for ‘prior to the creation of the law, there is already an obligation [*debitum*] to avoid the evil that it prohibits.’⁴² The divine will’s prohibition or commandment adds to this existent obligation. In this passage and others, Suarez speaks of the creation of such laws as, in a sense, extending the intrinsic wrongfulness of certain actions to a new register: for they are not merely harmful or wrongful in themselves, but also sins against God. (In much the same way, a child who is forbidden by her parents from lying, has a reason for avoiding lies that goes beyond the wrongfulness of such acts in themselves: that of going against the will of her parents.)

Suarez’s account of how the natural law is promulgated to us and binding on us is therefore in essential terms the same as that of Aquinas: our comprehension of the intrinsic goodness or contrary-to-goodness of a certain act both explains why we ought to carry out or refrain from the action, and that (in view of God’s perfect goodness) it is not merely a good idea, but also commanded or forbidden.⁴³

As a mode of *participation* of human reason in eternal law, natural law is both promulgated (i.e. available to human intellect) and obligatory, as distinct from advice that one might receive from others or one’s own inner voice. Aquinas and Suarez after him fully accord with orthodoxy on these points, which may be summarised by the words of the encyclical *Libertas praestantissimum* (and repeated in the

³⁶ Ibid, I-II.90.1c. See also *De Ver* 17.3c & ad 1: the specific way in which law moves one to action is through obliging and binding. Conscience binds only insofar as it gives us knowledge of a law made by a superior: ‘A human being does not make a law for himself, but through an act of cognition in which he recognises a law made by another, he is bound to fulfil the law’. See also *De Ver* 17.4 ad 2; *ST* I-II.19.5; *Sent* II.39.3.3 ad 3; Suarez, *DL* II.10.6; I.1.9 (where he considers also other etymologies).

³⁷ See *Sent* II.42.4.5 & IV.15.3.1.

³⁸ See *ST* I-II.94.2c, and below.

³⁹ The most famous such statement is found in Grotius, *De Iure Belli ac Pacis*, Prolegomena §11. Earlier instances include Vasquez, *In Primam Secundae* 97.1; Gregory of Rimini, *Sent* II.34.1 ad 2; Biel, *Sent* II.35.1e21-25; Suarez, *DL* II.6.3.

⁴⁰ See *DL* II.9.4; I.14.12 (obligation is ‘the adequate effect of law’ in a person); II.6.11-22. These passages speak of ‘the addition of an obligation’ [*addat obligationem*] to the *debitum*; but Finnis follows the English translation of (selections from) *De Legibus*, in supposing that Suarez is confusedly suggesting the presence of an ‘additional obligation’. For a careful analysis of Suarez’s position, see T Irwin, ‘Obligation, Rightness and Natural Law’ in D Schwartz ed. *Interpreting Suarez: Critical Essays* (Cambridge University Press 2012), 142.

⁴¹ Suarez, *DL* I.5.24.

⁴² Ibid, I.9.4.

⁴³ Ibid, II.6.2 (God as efficient cause of obligation); II.6.6 (a true law must indicate the source of its obligation). Compare Aquinas, *ST* I-II.99.5c, discussed below.

Catechism of the Catholic Church): ‘Above all there is natural law, which is inscribed and graven upon the soul of every human being, for it is human reason ... but the command of human reason would lack the force of law were it not the voice and interpreter of that higher reason to which all our spirit and freedom must be submitted.’

III. Natural Law and Ethics

With these facts in mind, we can turn now to the question of the natural law’s relationship to ethics. Finnis regards Aquinas’s natural law as a synonym for ethics.⁴⁴ But this view seems difficult to square with the arrangement of topics in the *Summa*, which begins in the Prima-secundae with a consideration of our supreme end (to stand in God’s presence after death), followed by an account of the virtues and vices that lead toward or away from God, along with a study of practical intellect and a treatise on Grace, and finally the long and detailed treatment of particular virtues in the Secunda-secundae. In between these lengthy ethical treatments there is a relatively small ‘treatise’ on laws, in which only a few questions are devoted to natural law. These questions do not restate the conclusions of the treatises on ends and virtues, but occupy themselves with a different kind of question: namely, whether it is possible for a human being to be so depraved that they are entirely without the most basic precepts of right and wrong;⁴⁵ and whether human laws can be so contrary to the good of the community that they become more akin to acts of violence.⁴⁶ In relation to the first, Aquinas argues that the fundamental precepts of natural law can never be totally obliterated from the human heart, although certain secondary precepts may be caused to fail in particular cases. In both cases, he is clearly concerned with what we might call a minimum core morality, one that pertains to those individual and social goods upon which the survival of all societies depend: goods such as peace, justice, security from internal and external threats to safety, punishment of criminal behavior, and so on.⁴⁷ It does not extend to common goods over and above this minimum (such as the provision of services like medicine or tertiary education, or large public building works), nor to individual perfection of virtue. Natural law embodies standards for behaving (whether of the individual or the holder of public office) that all persons can reasonably be expected to reach, not just an exceptional few.

This difference between natural law and ‘ethics’ understood in the broadest sense of virtue, is important in comprehending the position of Suarez. His *De Legibus* is not a treatise on the whole of ethics, but only on law (i.e. the same questions discussed in the *Summa* I-II.90-108). To gain a complete picture of Suarez’s ethics, one would have to read beyond this text, to look at (for example) his *De Fine Hominis*, or *De Bonitate et Malitia*, *De Caritate* or the tenth of his *Disputationes Metaphysicae*. Even more than Aquinas, Suarez restricts the idea of natural law to what is morally necessary, not what is required for the perfection of virtue. This is the reason why modern commentators on Suarez take him to be offering a narrower understanding of ethics than Aquinas, and a more stringent idea of obligation. In fact, Suarez restricts the idea of obligation (through divine will) to only those actions that are morally necessary, not to virtuous actions that demand a greater order of excellence.⁴⁸

These points are essentially obscured in translation, for the English text of *De Legibus* II.9.4 (amongst others) talks of the divine will as the source of ‘its own especially imposed obligation of avoiding the thing in question.’⁴⁹ But the Latin text does not say ‘obligation’; it says ‘necessity [*necessitas*] of avoiding the thing in question.’ Here, Suarez has in mind those (usually negative) obligations that are necessary for moral goodness, not counsels of perfection. As such, these passages are concerned with goodness of

⁴⁴ See sources quoted in n 5 above.

⁴⁵ *ST* I-II.95.1c & ad 1.

⁴⁶ *Ibid.*, I-II.96.4c.

⁴⁷ See I-II.94.2c (social peace); I-II.96.2 (human law does not suppress all vices); I-II.96.3 (it does not require all acts of all the virtues).

⁴⁸ See Suarez, *De Statu Religionis* I.7.3; *DL* II.6.9 & I.4.7.

⁴⁹ See T Pink ed, *Selections From Three Works of Francisco Suarez* (Liberty Fund 2015), 253.

an inferior order to that of ethical perfection (e.g. with restitution rather than generosity). Natural law, as for Aquinas, is a part of ethics, not the whole of ethics.

Suarez's agreement with Aquinas on these matters is made clear when we turn to those passages in the *Summa Theologiae* that are cited by Suarez in his discussion of the differences between moral duty and moral excellence. In those passages, Suarez distinguishes the imperative will of God in willing precepts of law, with the simple will [*voluntas simplex*] that is involved in guiding persons to moral improvement or excellence [*ad melius*]. Aquinas writes:

Certain things are included in the Law in the form of precepts, whereas others are included as ordered to the fulfilment of the precepts. The precepts relate to things that have to be done, and human beings are impelled to their fulfilment in two ways, namely the authority of the lawmaker, and the benefit that derives from their being fulfilled, which consists in the attainment of some good, whether useful, pleasurable or moral [*honestas*] ... Moral duty is twofold, for reason dictates that something is to be done either because it is so necessary that, without it, the order of virtue would be destroyed, or because it is useful for better securing the order of virtue. In this way, some of the moral precepts are expressed in the form precisely of commands or prohibitions ... [whereas] others are demanded or prohibited not precisely as a duty, but as something that is better done.⁵⁰

It is clear therefore that both Aquinas and Suarez recognise the existence of actions *ad melius* that are good to perform, but not demanded by an absolute duty. The distinction between the two kinds of action marks the distinction between those acts that everybody ought to recognise as binding on them (such as honesty or refraining from injustice), and those that are either excellences or (even more stringently) counsels of perfection (such as liberality or mercy). Whereas Aquinas includes the latter kind of actions under natural law by way of fulfilment – i.e. complete merit – Suarez excludes them from natural law per se. By doing so, he emphasises the excellent and virtuous character of morally good actions that one is not under a duty to perform. He does not, as his critics have suggested, reduce all moral action to duties imposed by divine command. If Suarez has a stricter interpretation of natural law duties, it is not to eliminate the idea of goodness from ethics, but rather to make room for numerous forms of goodness and moral excellence.⁵¹

Critics of Suarez have failed to notice this aspect of his ethics because of a narrow focus on his *De Legibus*, i.e. his commentary and elaboration on the *Summa*'s 'treatise' on law (I-II.90-108). They appear ignorant of his substantial works on human good (*De Bonitate et Malitia*) and on human ends (*De Fine Hominis*), as well as his treatise on the virtues (*De Fide, Spe et Caritate*). These works show Suarez to be following an ethics of the good, i.e. a eudaimonist ethics. Suarez takes the point of ethics to be a search for our ultimate end and good: the beatific vision [*visione Dei*] in the afterlife.⁵² But his ethics is also concerned to note the possible ways in which human beings can aspire to this end, whether by observing the precepts of natural and divine law,⁵³ or by selecting means that more fully and perfectly lead to the end, as in supererogatory virtue.⁵⁴ Typically, critics do not cite from these works.

IV. Inclination and Rational Nature

The critics have another ground on which they regard Suarez as having departed from the doctrine of St Thomas. In place of Aquinas's careful account of the primary practical precept, which announces that the good is to be done and the bad must be avoided, it is said that Suarez determines natural law precepts according to what is in harmony with rational nature. This (so the critics maintain) is to

⁵⁰ *ST* I-II.99.5c.

⁵¹ See e.g. *DL* I.15.10.

⁵² Suarez, *De Fine Hominis*, III.6.3.

⁵³ See *De Bonitate et Malitia Humanorum Actuum*, XI.2 & V.2-3.

⁵⁴ *De Fine* I.4 & 2.1; *De Bon* VI.5.

reduce arguments that are purely practical, to a series of anthropological propositions, and hence Suarez is an inferior copy of Aquinas rather than a faithful interpreter.⁵⁵

These objections fail to draw attention to the numerous passages in which Suarez makes clear that ‘rational nature’ does not of itself either issue commands or indeed make clear the rectitude or turpitude of anything.⁵⁶ It neither directs nor illuminates, and neither possesses any of the effects that are proper to law: it can be referred to as a kind of law only in an extended or metaphorical sense that is apt to mislead.⁵⁷ The references to ‘rational nature’ reflect a commonplace shorthand way, common amongst early and late Scholastics (and Aquinas!), of referring to natural law, but do not consider human nature as the source of knowledge of natural law.

These issues are connected with the question of whether natural law is the same for all, is present in all human beings, to the same degree, and so on. Aquinas will respond roughly as follows: (i) human reason is not itself the rule of things, but the thing ruled; hence despite the wide variety of ways of living in specific communities, which are erected through human effort, there is yet a rule or measure of good and bad that neither depends upon nor derives from these particular arrangements and circumstances, and in this respect natural law is the same for all;⁵⁸ (ii) even this variety in modes of living in community (some of which are very bad) does not completely obscure the basic tenets of the natural law — the natural standards for the measuring of human good and bad — from human minds,⁵⁹ although (iii) the effects of one’s customary way of living and of human sin in general mean that different individuals have a differing grasp of those standards, both in terms of the extent to which they grasp them and the degree of explicitness or clarity in that grasp;⁶⁰ (iv) but the most basic precepts of natural law reflect inclinations that are prior to explicit understanding,⁶¹ yet (v) the human capacity and freedom to sin means that a completely indiscriminate pursuit of inclinations and desires cannot supply the basis for moral insight into the good: reason needs the guidance of precepts.⁶²

The subject of inclinations is important in understanding what the appeal to ‘rational nature’ is intended to capture. Turning first to Aquinas, he remarks that every thing has a disposition [*habitus*] toward its natural form, in such a way that it inclines toward this form when it is lacking, and rests in it when it has it; and it is the same with dispositions toward every natural perfection, or natural good: in creatures without intelligence, this disposition is a natural appetite, whereas in rational beings it is apprehended as something intelligible, either as a satisfaction (when possessed), or else as something to be pursued (when absent).⁶³ Yet even in rational beings, natural appetite or love precedes the intellect, for it is from the stirring of these natural desires that the inclinations take shape in the will.⁶⁴ And it is experience of one’s intelligent wants, and of their prospective fulfilment, which activates practical deliberation concerning things to be done. So, following Aristotle, Aquinas points out that the object of inclination is an end [*finis*], which has the intelligible significance of ‘good’, for ‘the good is what all things incline toward.’⁶⁵ Thus Aquinas states that the primary precept of natural law is that ‘the good is to be done and pursued, and the bad is to be avoided.’⁶⁶ The terms ‘inclination’ and ‘natural

⁵⁵ For the accusation, see e.g. Finnis, *NLNR*, 49. In fairness, Finnis takes this to be the maxim of ‘neo-Suarezians’, but it is nonetheless a reasonable summary of the view he attributes to Suarez and Vasquez on the two preceding pages. But cf. *DM* X.1.14: ‘Truth is only the attribute [of a being] insofar as it is connotative of an agreement with the intellect; therefore the same must be said concerning good...’; *DL* I.1.2: natural law exists in non-rational beings, at the level of inclination, only by a kind of metaphor.

⁵⁶ *Ibid.*, II.5.5.

⁵⁷ *Ibid.*

⁵⁸ *ST* I-II.91.3c & ad 2; I-II.94.4c.

⁵⁹ *Ibid.*, I-II.94.6c & ad 1.

⁶⁰ *Ibid.*

⁶¹ See e.g. I-II.91.2 ad 3; I-II.94.2c.

⁶² *Ibid.*, I-II.91.2 ad 2.

⁶³ *ST* I.19.1c. See also the important essay *CEJFI* 9.

⁶⁴ *Ibid.*, I.60.1c; I-II.26.1 ad 3; I.77.6c; I-II.18.1c.

⁶⁵ See e.g. *ST* I-II.94.2c; *In Eth* I.1.9-11, following Aristotle, *Nicomachean Ethics* I.1.1094a; *Topics* III.1.116a. *Appetunt* is correctly rendered as ‘incline to’ rather than ‘desire’ since its scope is not ‘all rational beings’ or even ‘all living things’ but simply ‘all things’ [*omnia*]: see also *In Eth* I.1.11 where *appetunt* is equated with *tendunt*.

⁶⁶ *ST* I-II.94.2c.

apprehension' recur throughout the article: Aquinas says that 'all those things to which the human being has a natural inclination are *naturally apprehended* by reason as goods ... and those things that run contrary to inclination as evils...'

By referring to *natural* apprehension, Aquinas does not mean to imply a doctrine of 'innate ideas', inborn knowledge of the truly good versus merely apparent good (actual evil). As with all knowledge, one is required to *attain* practical knowledge through insight into the meaning of one's experience.⁶⁷ There is a difficulty to be overcome, however: for Aquinas warns that whereas the inclinations of non-living things are merely a response to external forces (the archer's direction of an arrow to its target),⁶⁸ and those of living animals, which can discern proximate (immediate) ends and bestir themselves to action on this basis, are naturally 'determined for them',⁶⁹ rational creatures, by contrast, 'move themselves toward the end, and move themselves to desire both the end and the means.' So unlike non-rational animals, human beings possess the capacity to understand their inclinations, an understanding that brings with it a freedom of intention: to do or not to do, follow or not to follow, one's inclination. How then are we to determine which inclinations are to be followed, and which not?

It may seem that Aquinas's contrast, between creatures whose inclinations are 'determined for them', versus rational beings whose inclinations are determined by their own freely elective choice, means that rational beings do not in fact possess *natural* inclinations. He therefore softens the contrast. In reflections (on Aristotle's *Ethics*) to be taken up again in the *Summa*'s treatment of natural law, he observes that Roman jurists call something 'right by nature' if it flows from inclinations that are common to humans and other animals: such as reproductive union, protection and education of offspring, and so forth;⁷⁰ and from this the Romans distinguish that which is right according to inclinations that are specifically human, in virtue of being rational, which they call the 'right of peoples' [*ius gentium*], since all people follow it: such as the requirement that agreements be observed, and so on. But, Aquinas says, *both* kinds of right are properly included in the idea of what is naturally just.⁷¹ Thus, in the *Summa* he observes that there is an 'order that obtains amongst the precepts of natural law', an order which 'corresponds to the order that obtains amongst the natural inclinations'. The most basic precepts pertain to inclinations of the vegetative soul (in common with all things), such as the inclination to preserve oneself; then, a second order of inclinations flow from the animal soul (in common with all animals), such as the inclination to raise children; and finally those relating to the rational soul, including the desire for knowledge and peaceful society with others.⁷²

This order among the natural inclinations is what it is, not by virtue of human reason, but in virtue of 'nature'. Practical reason's rule does not establish or impose its authority upon a mere chaos; so whilst knowledge of natural law precepts does not epistemically derive from facts concerning human nature, those precepts are, nonetheless, ontologically dependent upon that nature. This dependency is clearly visible in Aquinas's observation that human nature is known through what perfects it,⁷³ and these perfections through its characteristic potentialities, which are in turn comprehended by knowing their actions, and those actions in virtue of their objects.⁷⁴ And the intellectual basis of all those objects is the first indemonstrable principle, that good is to be done and pursued, and evil avoided.

⁶⁷ See *Sent* II.24.2.3; *In Eth* VI.3.1147.

⁶⁸ The example is Aquinas's (see *In Meta* V.17.1000), though a commonplace in ancient philosophy.

⁶⁹ Ibid; thus animals 'are acted upon rather than acting [in the proper sense]'. See also Suarez, *DL* I.1.2.

⁷⁰ See *In Eth* V.12.1019. Some translations of the passage render the Latin *ius naturale* as 'a natural right', but the point of the passage is rather concerned with what is naturally objectively right, or just by nature, hence I have translated the phrase as 'right by nature'. Some controversy exists concerning the relationship between what have been called 'objective' and 'subjective' rights (though by the latter is meant something closer to 'possessive right', i.e. a right possessed by an individual), and whether Aquinas had the latter notion. My preferred translation should not be taken as a denial of subjective rights in Aquinas (for see *ST* II-II.57.1 ad 1; for Suarez's more detailed treatment see *DL* I.2).

⁷¹ Ibid. See also Suarez, *DL* II.17.6 (actually a more emphatic contrast than in Aquinas, between animal sensate nature and human inclination).

⁷² *ST* I-II.94.2c.

⁷³ Ibid, I.5.1.

⁷⁴ Aquinas, *In de Anima* II.6.308; see also Finnis, *Fundamentals of Ethics* (Georgetown University Press 1983), 21. Similarly *ST* I.60.5c ('natural inclinations in beings devoid of reason reveal the natural inclination belonging to the will of an intellectual

Accordingly a person's natural apprehension of natural law precepts can be reconstructed as follows. One's experienced inclinations are understood by grasping their objects, and the very freedom human beings possess in relation to those objects means that such a grasp will take a preceptive form: that something *is to be* done or avoided. But the variety of precepts has an order to it, beginning with the intelligibility of 'good'. All other precepts or proposals as to what is to be done are based on this intelligibility: namely, that the pursuit of anything at all must stem from a grasp of it as 'good', not merely as desirable, that is, as worthy of choice from some reason beyond the fact of one's attraction to it.⁷⁵ The most immediate precepts which flow from this include, as Aquinas says, that self-preservation is a good, and that which threatens its destruction is to be avoided; and thus also knowledge is good, and its antithesis must be avoided ... These precepts are the most general and self-evident, and they follow immediately from the primary precept; they are less like precepts of natural law than the ends at which those precepts aim.⁷⁶ Other precepts follow on closely from these, such as that one should not act with evil toward another. These *first* principles of natural law cannot be completely excluded from the understanding even of the very wicked, however defective their acknowledgement of them, and however divorced from virtue their actions are.⁷⁷ More subordinate precepts are reached as *conclusiones* only after careful reflection;⁷⁸ or otherwise as *determinationes*, which relate to these principles as the architect's design decisions and plans relate to the general idea of a building.⁷⁹ So the general and self-evident principles relate to the most basic inclinations that humans share with all substances (i.e. survival and basic aims), whereas the second- and third-order precepts concern most closely the second-level inclinations (conditions for pursuing the satisfaction of fundamental needs), and the third- and fourth-order precepts relate most closely to the tertiary inclinations (the needs of social life, etc.)

Now the goods that practical reason grasps as self-evident, and the self-evidence of which is apparent to all persons (at least those capable of understanding the meaning of the words) are, in this very same act of understanding, grasped as *human goods* [*esse bona humana*].⁸⁰ They are therefore at once also the ends of the moral virtues,⁸¹ for there arises immediately from the understanding that such goods are not merely good for oneself personally, but good for others insofar as their nature resembles one's own, a series of duties of justice insofar as one's actions affect those goods positively or negatively, and enhance or diminish them for others. (It should be added: also duties pertaining to other virtues, such as mercy, magnanimity, sociality, etc.) Generally speaking, if these moral understandings are to have any sophistication, or the robustness that moral precepts ought to have, then at least some of them must be presented as clearly formulated propositions in one's practical deliberations.⁸² But just as it is possible for unreflective persons to think and reason in accordance with primary indemonstrable principles (such as non-contradiction) without ever having consciously articulated them, a mode of knowing which Aquinas calls *habitus* or *intellectus* [dispositional], so in practical reasoning one may have a disposition to act and reason in accord with the primary precepts of natural law: a disposition Aquinas calls *synderesis*.⁸³ Indeed Aquinas regards some true human goods as self-evident only to the learned, not because of the wise person's aptitude in practical reasoning, but because the rational considerations involved require careful induction from experience and memory.⁸⁴

being ... for reason copies nature'; *Sent* IV.49.1.3.2 ad 2; *De Ver* XI.2 ad 5 (the Gentiles are 'a law to themselves' insofar as they *manifest* the law (as unlearned impulses), but not because they have 'taught themselves').

⁷⁵ See e.g. *Sent* IV.33.1.1; *SCG* III.129; Suarez, *De Bon* II.2.11.

⁷⁶ *ST* I-II.100.11c [*quasi fines praeceptorum*].

⁷⁷ See e.g. *ST* I-II.94.4c; *Sent* II.39.3.1 (even those facing damnation).

⁷⁸ *ST* I-II.100.3c & ad 1.

⁷⁹ *Ibid*, II-II.57.1 ad 2.

⁸⁰ *Ibid*, I-II.94.2c.

⁸¹ *Ibid*, II-II.47.6c & ad 3.

⁸² *ST* I-II.71.2c; see also I-II.94.3 ad 2; I-II.18.5c; I-II.78.3c; II-II.158.2 ad 4.

⁸³ *ST* I-II.94.1 ad 2: synderesis is 'a law of our minds, since it is a disposition which contains the precepts of natural law, which are the first principles of human actions.'

⁸⁴ See *Sent* II.24.2.3c; *In Eth* VI.3.1148; *ST* I.17.3 ad 2. See also T Hoffmann, 'Conscience and Synderesis' in B Davies ed. *The Oxford Handbook of Aquinas* (Oxford University Press 2012), 255. Compare also *Sent* IV.2.1.4.1 ad 2; *Sent* III.29.3c; *Sent* IV.49.1.1.3 ad 1 (speculative intellect is related to the good more completely than the practical intellect, which has to do with particulars).

In rational beings, then, the natural law exists not as a ‘violent motion’ [*motibus violentis*] but as a natural motion;⁸⁵ that is to say, as a draw (*ad finem*) rather than impelling force (*ex voluntas*). Does Suarez depart from these teachings? He does not: his discussion of Quaestio 94.2, Suarez clearly understands Aquinas’s purpose in ‘reducing’ natural law to a foundational precept, for he enumerates the different ways in which order can be observed among the natural precepts: in relation to generality and particularity, or self-evidence, proximity or distance to final cause, or as to the different grades of inclination in a rational being. Suarez affirms Aquinas’s position: all these ways of comprehending natural precepts are founded upon the intelligibility of good. As the focus of discussion shifts (e.g. between ethics and ontology), so will the idiom in which one speaks of good or goodness.

So there are indeed many occasions where Suarez is happy to speak of ‘good’ as ‘agreeable to rational nature’, when questions of metaphysics are in issue;⁸⁶ but he is very aware that one cannot simply therefore ‘follow nature’ as one’s supreme *ethical* precept. For *then* the discussion concerns ‘good’ as ‘end’, ‘for we are speaking about rational will and right practical reason.’⁸⁷ In an ethical context, we are dealing with reasoning from ‘primary and common principles’ which express ‘self-evident truths’, such as that good is to be done and evil rejected,⁸⁸ whereas others of more specificity (though still self-evident to the learned) require ‘reflection and intricate reasoning’, as with giving alms out of one’s superfluous possessions.⁸⁹ The ontology of ‘good’ comprehends it as the addition to being of an attribute (non-relational) of agreeability;⁹⁰ but in ethics, the concern is with ‘the ordering of natural precepts according to the different *objects* of natural inclinations ... which ought to be regulated by right reason.’⁹¹ Thus goodness or evil is a property of a human act ‘in view of its *object*, considered in relation to the extent to which the object is in accord or disagreement with *right reason*.’⁹² It is on this basis that one can infer whether some action is in harmony or opposition to rational nature. The position is precisely the same as Aquinas’s, as is evident from his response to the question in his Commentary on the *Sentences* as to whether a person can have a rational appetite for misery. There, Aquinas proves himself perfectly willing to talk of good and goodness as natural attributes of a rational nature.⁹³

It must be said that the actions of a secondary cause are always founded upon the action of the first cause, which they presuppose. Thus every activity of the soul must proceed on the supposition of that which is impressed into it by the first agent, God. Hence it is seen on the part of the intellect that a soul cannot proceed to understand anything except from the supposition of those things the knowledge of which is innate to it. For this reason it cannot assent to anything that is contrary to those principles which it knows naturally. And it must be the same for the will: thus, since from the impression of the first cause, namely God, the soul has impressed into it that it must will the good, and desires perfect good as its ultimate end, it is impossible for the contrary to enter into its desires. Hence no person can take as the object of their will misery or evil, except *per accidens*, which happens when it desires something evil that it apprehends as good.

⁸⁵ *Sent* IV.49.1.3.1c: all that moves must have its motion from the first mover; but some are so through violent motion, in which the impression made by the first mover is ‘beside the nature’ of the secondary mover (as a hand wields a stick to strike), whereas some are moved through natural motion, in which the impression of the first mover is in the secondary mover as a natural tendency; see also IV.49.1.3.1.2 ad 2 (‘compulsion, since it introduces violence, and prohibition similarly do not belong to that necessity which is consequent upon the nature of a thing, because all violence is against nature.’)

⁸⁶ See e.g. *DM* X.1.12.

⁸⁷ Suarez, *Quaestio de legibus* III.3 (appended to the Pereña edition of *DL*); see also *De Fine Hominis* II.4 & III.6; *DL* II.7.4 (natural law precepts ‘are clearly characterised by the *goodness* necessary for rightful conduct...’); I.3.3.

⁸⁸ *DL* II.7.5; also I.1.1, where Suarez is clear — from the outset — that the idea of a ‘rule or measure’ is inadequate as an explanation of law unless it is also relatable to the practical intellect of rational creatures as a *precept*. See also I.3.2.

⁸⁹ *Ibid.*, II.7.6.

⁹⁰ *DM* X.1.12.

⁹¹ See n 79 (‘[human] nature as such inclines toward the good; and therefore the object of a natural inclination, considered in itself and proposed by right reason, is morally good [*honestum*] and pertains to the law of nature.’); also *DL* I.1.10.

⁹² *DL* II.6.17. Finnis’s discussion in ch 2 of *NLNR* cites these exact passages from *De Legibus*; but they offer no support to his reading of Suarez: in each case, Suarez is concerned in the first place with the self-evidence of natural precepts, or precepts derived therefrom, and the idea of conformity to nature is only a secondary (or tertiary! — *DL* II.5.4) concern. Finnis does not, in this context, look outside of the *De Legibus*.

⁹³ *Sent* IV.49.1.3.2; Suarez considers its near-neighbour IV.49.1.3.4 as a clearer account than Aquinas gives in *ST* I-II.1.6.

Aquinas is clearly talking here in an ontological mode, of what gives shape and form to the natural inclination which forms the basis for the primary precept ('good is to be done...') and all that presuppose it. It is a statement not of practical reason, but a description of what is necessary in or for human nature.⁹⁴ And it provides an intelligible starting-point for a discussion of ends in the domain of practical reasoning, not indeed only at the level of extreme abstraction, but in relation to the correction of very concrete errors of reasoning.⁹⁵ Aquinas gives the example (frequently encountered in pedagogical contexts today) of persons who believe that one can have a rational desire for suicide as such, so that life is not good for all. He explains that no person can have an inclination or desire for non-being, unless something good is added to it; existence is a good in itself, but can be rendered bad and hateful through being conjoined with sorrow or misery [*tristitia vel miseria*], in which case non-being is reasonably desirable insofar as the good (escape from sorrow and misery) is conjoined to it.⁹⁶

V. Moral and Pre-Moral Goodness

The interpretation offered by Leonine Thomists understands Aquinas's concern as being with certain basic human goods, such as knowledge, aesthetic appreciation and play.⁹⁷ These goods are non-moral goods, for they 'concern the evaluative substratum of all moral judgments.'⁹⁸ At least one reason for regarding the basic goods as non-moral goods is the desire to demonstrate to modern liberals that natural law theory does not insist upon the superiority of one single form of living: there are many reasonable ways of living, according to the many ways in which one can choose to pursue combinations of basic goods. No permanent hierarchy exists amongst the goods, although circumstances may render it more reasonable to pursue one good (say, life) over another (e.g. knowledge), such as when the library is burning down around me.

Two responses are worth making to this image. The first is that Aquinas does in fact propose a natural hierarchy amongst such goods, ranging from the most fundamental (preservation of one's existence) to the most excellent (knowledge of God and living peacefully in society).⁹⁹ The second is that Aquinas would regard this range of goods as natural goods [*bonum naturale*], not virtuous goods [*bonum honestum*]. But it is the virtuous goods of friendship, justice, charity and compassion that are, for Aquinas, the fundamental goods in which happiness consists: 'Virtuous good is the fundamental human good ... whereas goods pertaining to the body, or external goods that benefit the body, are secondary goods.'¹⁰⁰ Natural goods 'do not belong to the very essence of happiness, but are [merely] necessary instruments in the service of happiness, which consists in the operation of virtue.'¹⁰¹ To dwell on those created goods that bring natural human desires to rest is a mortal sin,¹⁰² and does not provide any foundation for true happiness (beatitude).¹⁰³

The conclusion is hard to avoid: Aquinas's uninterest in recognising a hierarchy amongst the natural goods stems not from an impulse to liberalism, but from the fact that a person's choices and preferences between such goods are largely immaterial to the true goods after which human beings ought to strive, namely virtuous goodness. In recognising moral or virtuous goodness as supplying the

⁹⁴ Early Jesuit opponents of Aquinas certainly read him as making room for 'nature' in these senses, for they criticised him precisely on the basis of extending the concept of law to both rational and irrational nature: see e.g. de Salas, *In Primam Secundae*, 14.1.4; Vasquez, *In Primam Secundae*, 91.1. See also H Höpfl, *Jesuit Political Thought: The Society of Jesus and the State c. 1540-1630* (Cambridge University Press 2004), 267-69.

⁹⁵ On the four types of domain see Aquinas, *In Eth* I.1.1; also see Finnis, *Aquinas: Moral, Political and Legal Theory* (Oxford University Press 1998), 21-22 & 34-37.

⁹⁶ *Sent* IV.49.1.3.2 ad 3: 'reasonably desirable' because Aquinas's terms *appetitus/appetibile* which I have rendered as 'desire'/'desirable', refers to a capacity or power, rather than a subjective emotion. But this does not imply that such desires are *fully* reasonable, all things considered.

⁹⁷ See e.g. *NLNR* chs III-IV.

⁹⁸ *Ibid*, 59.

⁹⁹ *ST* I-II.94.2c.

¹⁰⁰ *Ibid*, III.15.6 ad 2. On Finnis's elision of natural good and *bonum honestum*, see *NLNR* 76n.

¹⁰¹ *Ibid*, I-II.4.7c.

¹⁰² *Ibid*, I-II.108.4c; *De Caritate* VI; following Augustine *De Civitate Dei* XIV.28.

¹⁰³ *ST* I-II.2.8c & ad 3.

primary precepts of natural law, Suarez is not therefore departing from Aquinas, but in fact strengthens his account. He does this by observing distinctions between different grades of moral goodness even outside those acts that are necessary for moral goodness under natural law. He agrees with Aquinas that the virtues are essential for beatitude (as well as for happiness in this life)¹⁰⁴ But (like Aquinas) he does not regard the choice between permissible actions as a decision between morally indifferent options; they entail a freedom to choose between morally good ends.¹⁰⁵ To use Suarez's own example, a widow who remarries performs a morally good act, though of an inferior order of goodness to one who decides to live a life of chastity after the death of their spouse.¹⁰⁶

Suarez therefore recognises that a person's decisions are seldom matters of moral indifference, and that it is *better* for a person to select the morally most excellent option.¹⁰⁷ For example, I am under no obligation of justice to refrain from suing a debtor who has defaulted on payment, but if the debtor is in financial difficulties then waiving one's right to repayment may be a morally more excellent act. This further illustrates Suarez's argument that God does not command the performance of every single morally good act (or even *all* acts that accord with human nature), but only prohibits intrinsically evil acts by way of the natural law.¹⁰⁸

These finer distinctions between modes of action can be seen in the contrast between Finnis's approach to the basic goods, and Aquinas's treatment of natural goods. Speaking of the good of knowledge, Finnis seeks to show how the goodness of knowledge is self-evident, and sufficient in itself to explain the human desire for knowledge. It is reasonable or intelligible for me to read a book simply to gain a knowledge of what takes place in it, and for no further reason (e.g. to appear intellectual or to do well in an examination). The goodness of knowledge extends to a greater or lesser degree to all instantiations, including discovering the truth of 'some gossipy rumour.'¹⁰⁹ Only the criteria of practical reasonableness determine the moral quality of any act of knowledge-seeking: that one must not read to gain a knowledge of how to kill one's rival, for example, as this aims against a basic good (life).

When we turn to Aquinas, however, we find him arguing that acts of knowledge-pursuit are not morally indifferent in this way. For he distinguishes the properly virtuous desire for knowledge [*studiositas*] with the inordinate desire for the satisfaction of one's inquisitiveness [*curiositas*].¹¹⁰ Again, it is necessary to distinguish between curiosity, for example, aimed at blackmailing one's neighbour (forbidden by natural law), study of God's nature for the purposes of passing a Divinity examination (morally more excellent than the study of trivia), and the study of God as supreme end and for the sake of one's soul (moral perfection). As these examples show, Aquinas (and Suarez after him) are not concerned with pre-moral goods, but virtuous goods.

VI. The Impious Counterfactual

We have seen that Suarez is overwhelmingly faithful to Aquinas's account of natural law. Where he diverges from Aquinas, it is only to strengthen Aquinas's contrast between the precepts that bind us to refrain from evil actions, and the counsels of perfection or excellence that allow us to approach our ultimate end in a superior way. Consequently, his account of natural law places a greater emphasis on divine will. But there is one more reason for Suarez to hold a view of natural law in which the idea of divine will is more visible.

¹⁰⁴ Suarez, *De Fine Hominis* VII.2.15; X.1.8.

¹⁰⁵ *De Bon* X.3.3-9; Aquinas ST, I-II.18.9c.

¹⁰⁶ Suarez, *DL* I.15.10. (I am grateful to Tobias Schaffner for the references in this paragraph.)

¹⁰⁷ *Ibid*, II.2.15.

¹⁰⁸ *Ibid*, II.16.11.

¹⁰⁹ Finnis, *NLNR* 60.

¹¹⁰ *ST* II-II.116-117.

As we have seen, the natural law belongs to the domain of practical deliberation and action, rather than that of ontology and nature, insofar as it is an agent's rational grasp of what must be done or avoided.¹¹¹ In exactly this context, it became necessary for Suarez to defend Aquinas's view against extreme versions of scholastic rationalism and naturalism which undermine the idea of participation in divine reason. Since Aquinas says relatively little on the subject, Suarez was obliged to develop the relevant points in some detail. The threat becomes visible if we examine again the counterfactual argument concerning God's existence. In the form stated by Grotius, the argument is that:

what has been said [concerning natural right] would retain a measure of validity even were that to be granted which cannot be conceded without the uttermost wickedness, that there is no God, or that human affairs are of no concern to Him.¹¹²

The point being made is that it is not God's will, or legislating act, that renders an act (say slaying the innocent) bad or good, but intrinsic properties of the act itself, as presented to rational judgment. God's will cannot render generosity bad and intemperance good, for these are properties intrinsic to the kinds of act in question. But there is an ambiguity to the argument which was not lost on the Thomist interpreters with whom Suarez was in debate: is the supposition (i) that God's creative act, in establishing the natures and properties of things, renders things intelligible as right or wrong on their own terms, independently of divine will, such that anyone's correct reasoning, even without revelation, can discover it; or (ii) that the properties of such things would include such intelligibility even if their existence were referable to some other fact than God's creation, and would obtain even if no (divine or human) being endowed with reason ever existed? Aquinas's rationalist critics understood the argument in the second way, claiming that what is good is in accord with divine reason not because it is divine, but because it is rational, and from there they were led to the more extreme position ('naturalism'), that what is good accords with divine reason *neither* because it is divine, *nor because it is reason*, but because it is *correct* reason: the correctness consisting in reason's apprehension of a property that exists even if reason itself never did.¹¹³

Suarez objects to this second way of understanding the counterfactual, since it assumes, absurdly, that natural goodness and badness are not from God, and are not reflective of a *divine* law.¹¹⁴ He points out that the rationalist/naturalist position is impossible on its own terms: if God is Creator of the world, one cannot hypothesise His inexistence and yet suppose that a world of intrinsic natural facts would still exist, in all other ways unchanged.¹¹⁵ The relevant counterfactual must therefore be the first.

It is upon this basis that Suarez attributes a necessary role to divine will in connection with natural law. The first counterfactual assumes that the natural goodness and badness of things can be rationally apprehended, at least in the beginning, without the additional understanding that one's correct reasonings are a participation in divine reason. But human reason has its power of discerning right and wrong from the eternal law in which it participates; moreover the intellectual foundation of its willingness to regard such standards as true independently of it is the belief in the ultimate rationality and orderliness of the world.¹¹⁶ So in accepting the first counterfactual we accept that divine will has an explanatory role in the intellection of good and bad, though nothing as crude as the idea of a 'legislating act' as insisted upon by voluntarists.¹¹⁷

VII. Some Lessons

¹¹¹ But it should be noted that natural law belongs to the (first) order of ontology and nature, as explained above, insofar as it is equivalent with natural inclinations of human beings, not all of which necessarily manifest themselves as fully consciously and rationally chosen precepts.

¹¹² Grotius, n 39, §11.

¹¹³ This is the position of Gabriel Biel: see *Sent* II.35.1e17-24.

¹¹⁴ *DL* II.5.8.

¹¹⁵ See T Irwin, *The Development of Ethics* (Oxford University Press 2008), vol II §424.

¹¹⁶ *DL* II.6.3-4.

¹¹⁷ Of the various ways in which the counterfactual can be understood, I mention only those immediately relevant to the issue at hand.

It is hoped that the foregoing arguments demonstrate that Suarez was no inferior copy of Aquinas, who distorted and degraded the latter's work. In fact, Suarez is not a 'struggling innovator' but a faithful expositor of Aquinas's work against the background of Anti-Thomist dissenters in the centuries after Aquinas wrote. Both Suarez and Aquinas advance a eudaimonist ethics: an ethics centred upon our ultimate end in God, and of the means by which to attain it. In both cases, there is a distinction between the (i) the acts that it is necessary to perform for one's salvation (such as justice or refraining from criminal behaviour), (ii) morally more excellent acts (such as liberality or magnanimity), and (iii) counsels of perfection, which bring us most nearly to the end.

I have argued that the charges brought against Suarez by his critics are unfounded, and are based on a faulty reading of *De Legibus*, and a too-narrow focus on that work as opposed to his other ethical writings dealing with human ends and goods. If those critics had read Suarez with the same care as they read Aquinas, they would have concluded that Suarez is overwhelmingly faithful to Aquinas in all fundamental respects.

What follows from this reorientation? Let me briefly put forward two principal lessons: (i) the idea of 'secular natural law' ought to be rejected; and (ii) a theory of natural law must be founded upon virtuous goods rather than non-moral human natural goods.

Natural law involves the will of God, and thus cannot be entirely secular in meaning. Hence, the idea of natural law is not interchangeable with that of ethics. Both Plato and Aristotle discoursed on ethics and political science without invoking religious considerations: they did not possess a natural law theory. But a theory of natural law can nevertheless explain how philosophers to whom the divine law was not revealed could nevertheless arrive, on the basis of reasoning, at ethical truths. Such a theory can explain that God's insertion of natural reasonableness into human minds allows all human beings to become aware of ethical truth. But natural law adds to ethics the realisation that fundamental ethical truths are not merely constituents of a good and flourishing life; they are obligations commanded by God (as being part of eternal law). Natural lawyers at the present day are understandably reluctant to acknowledge this dimension of the doctrine as they are in debate with an almost entirely atheist audience. But this should not lead them to deny it: for even with this admission it remains entirely possible to articulate some of the primary truths of ethics in common with atheist philosophers, without disputing about the existence of God.

Secondly, natural law thinking should be premised upon virtuous goods rather than non-moral natural goods (such as knowledge or aesthetic experience). This does not threaten the idea that different forms of life are compatible with human flourishing; the life of the athlete and that of the scholar remain entirely consistent with the highest human ends, but this is so not because the central values of life are all equally fundamental, but precisely because they do not represent the highest ends or purposes of human life. Each such life becomes a good life by being centred upon the practice of the virtues. From the perspective of the supreme end, it is relatively unimportant which set of 'basic goods' are engaged in, in line with one's talents and opportunities. The central questions of natural law concern the virtuous goods to which a person aspires, and seeks through action to achieve.

Finally, it is to be hoped that legal scholars and ethicists will join in considering Suarez's work afresh, and to accord him his rightful importance in the tradition of natural law thinking.